No. 79875-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BEAL BANK, SSB, a Texas State Savings Bank,

Appellant,

v.

STEVEN and KAY SARICH, and the marital community comprised thereof; JOE CASHMAN and JANE DOE CASHMAN, and the marital community comprised thereof; WASHINGTON MUTUAL BANK; U.S. BANK NATIONAL ASSOCIATION #1000; and ONE ELEVEN HOMEOWNERS ASSOCIATION,

Respondents.

AMICUS CURIAE BRIEF OF THE WASHINGTON BANKERS ASSOCIATION, THE WASHINGTON MORTGAGE LENDERS ASSOCIATION, THE WASHINGTON FINANCIAL LEAGUE, THE WASHINGTON CREDIT UNION LEAGUE, AND THE WASHINGTON INDEPENDENT COMMUNITY BANKERS ASSOCIATION IN SUPPORT OF APPELLANT BEAL BANK

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I. INTRODUCTION

The Financial Industry *Amici* (identified in Part II below) have an interest in the principal legal issue presented in this case—namely, the proper interpretation and application of Washington law regarding the effect of foreclosures on junior lienholders. Relying on this Court's opinion in *Washington Mutual Sav. Bank v. United States*, 115 Wn.2d 52, 793 P.2d 969 (1990), *modified on denial of reconsideration*, 800 P.2d 1124 (1990), the trial court held that a non-judicial foreclosure sale pursuant to a first deed of trust wipes away not only the ***security*** held by junior lienors, but also the underlying ***debt*** owed to those junior lienors. This was clearly error, and if not corrected will have far-reaching negative consequences for both lenders and borrowers in this state.

II. IDENTITY AND INTEREST OF *AMICI*

A. Washington Bankers Association.

The Washington Bankers Association ("WBA"), founded in 1889 and incorporated in 1970, is an independent, nonprofit organization representing more than 80 member commercial banks operating in every county of the state. Member banks range in size from large multi-state financial institutions to smaller, family-owned and community-based banks. Through advocacy, comprehensive programming, and information

exchange, the WBA educates the public and advances the business of banking in Washington State.

B. Washington Mortgage Lenders Association.

The Washington Mortgage Lenders Association ("WMLA") has represented residential and income property mortgage lenders in Washington State since 1959. The WMLA focuses on government relations, consumer affairs, mortgage originator ethics, and the continuing improvement of information distribution channels to its members. Regular membership in the organization is open to firms engaged in mortgage lending, and associate membership is open to those firms providing services to the real estate finance industry. Regular members include independent mortgage bankers, commercial banks, savings banks, savings and loan associations, credit unions, and financial institution affiliated mortgage companies.

C. The Washington Financial League.

The Washington Financial League ("WFL"), founded in 1909, is a trade association representing community banks of all charter types and sizes with offices in the State of Washington. In providing a wide range of trade association services for its member institutions and their officers, directors and employees, the WFL's mission is to promote and protect the interests of its members doing business in the State of Washington and to

inspire cooperation and encourage sound business methods among its members.

D. Washington Credit Union League.

The Washington Credit Union League ("WCUL"), founded in 1934, is a non-profit trade association for Washington's credit union community. Credit unions—consumer-owned, not-for-profit cooperative financial institutions—are formed to enable the consumer-owners to pool their savings, lend to one another, and own the organization where they save, borrow, and secure related financial services. The WCUL is supported and funded through annual dues paid by 135 credit unions across the state.

E. Washington Independent Community Bankers Association.

The Washington Independent Community Bankers Association ("WICBA"), founded in 1989 and counting 63 institutions among its ranks, is a trade association committed to promoting and publicizing the advantage of community banking and focusing on issues, products and services that benefit Washington State community banks and their consumers. As the only trade association exclusively representing independent community banks, the WICBA focuses on banking issues from the perspective of community bankers and provides a platform on

issues and services not currently provided by other financial institution associations.

III. ARGUMENT

The primary issue in this case is whether the non-judicial foreclosure of a senior lienholder's deed of trust under the Deed of Trust Act, RCW 61.24.010, bars an action by a non-foreclosing holder of a junior deed of trust to recover on a debt secured by a junior deed of trust on the same property. Under Washington law, the foreclosure of a senior mortgage or deed of trust that extinguishes a junior mortgage or deed of trust does not satisfy or discharge the debt secured thereby or otherwise bar an action to recover that debt.[1] This Court's decision in *Washington Mutual*, 115 Wn.2d at 52, does not command a different result. If not reversed, the trial court's decision, based on a fundamental misreading of *Washington Mutual*, will have a profoundly negative effect on lending practices in the State of Washington—to the detriment of both lenders and borrowers.

A. Washington Law Does Not Bar Beal Bank's Action to Sue on Its Unsecured Debt.

Washington law has long held that "[i]n transactions involving both notes and mortgages, the notes represent the debts, the mortgages

[1] The amount of the debt secured by a junior deed of trust may be reduced to the extent the holder thereof applies for and receives excess sale proceeds deposited with the clerk of the court under RCW 61.24.080(3).

security for payment of the debts," and that "[e]ither may be the basis for an action." *American Fed. Sav. & Loan Ass'n of Tacoma v. McCaffry*, 107 Wn.2d 181, 189, 728 P.2d 155 (1986); *accord Seattle Sav. & Loan Ass'n*, 171 Wash. 695, 698, 19 P.2d 111 (1933); *Wilson v. Kirchan*, 143 Wash. 342, 346-47, 255 P. 368 (1927); *see also* GRANT NELSON & DALE WHITMAN, REAL ESTATE FINANCE LAW § 8.1 (Thompson West 2004) [hereinafter NELSON & WHITMAN]. Washington courts consistently recognize the distinction between a lien and the underlying debt it secures, and the right of the mortgagee to elect to pursue either or both.[2] The creditor (mortgagee) may sue and obtain a judgment upon the notes, or alternatively, the mortgagee may elect to foreclose on the mortgaged property and obtain a deficiency judgment. *American Fed.*, 107 Wn.2d at 190-91 (citing *Seattle Sav. & Loan*, 171 Wash. at 698-99). The Deed of Trust Act also recognizes the rights of the mortgagee to pursue either remedy—(1) by permitting an action on the debt secured by a deed of trust against any person liable thereon prior to a notice of trustee's sale or after discontinuance thereof or (2) by allowing commencement of a judicial foreclosure of the deed of trust or a trustee's sale thereunder after completion or dismissal of such action. RCW 61.24.100(2)(a)-(b).

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[2] Except as provided in the Act, a deed of trust is subject to all laws relating to mortgages on real property. RCW 61.24.020.

Accordingly, because an obligation stands separate and distinct from the lien that secures it, the loss of the lien does not mean loss of the obligation.[3]

Although no Washington case has been found confirming the rule that the debt held by a junior lienholder is not extinguished by foreclosure of a senior deed of trust or mortgage lien, Washington courts have held that the extinguishment of a lien by *waiver* or *release* does not extinguish the debt secured thereby. *See Sullins v. Sullins*, 65 Wn.2d 283, 285, 396 P.2d 886 (1964) (holding that where a creditor voluntarily waived a lien, the "[w]aiver of the lien does not extinguish the debt," and that "[a party] may elect to abandon the security and sue upon the debt alone"). *Sullins*, in turn, relied on *Frye v. Meyer*, 22 Wash. 277, 279, 60 P. 655 (1900), in which this Court held that a mortgagee "may elect to abandon the mortgage and sue upon the note alone." Likewise, when the non-foreclosing holder of a junior deed of trust elects not to bid at the foreclosure sale of a senior deed of trust, that junior lienholder is in effect

[3] The converse, however, is not true, for there can be no lien without something for it to secure. *See* NELSON & WHITMAN § 2.1 ("[W]here a mortgage is intended to secure a specific obligation . . . and that obligation becomes unenforceable under ordinary concepts of contract or commercial law, the mortgage is and ought to be unenforceable as well."). However, a debt underlying a lien exists, and remains enforceable, even if no party is personally liable on the debt. *See id.* (citing as one example, nonrecourse debt where the holder has agreed not to bring an action on the debt).

abandoning its security and electing to pursue an action on the debt. Accordingly, whether the abandonment of the security is by waiver or release, or whether it occurs through operation of the foreclosure process, the result should be the same.

Here, Beal Bank did not foreclose its junior deed of trust. To hold that foreclosure of a senior deed of trust automatically extinguishes the debt secured by Beal Bank's deed of trust would contravene the long held rule in Washington that a lien and the debt it secures are separate and distinct, and that one may abandon the security and still sue on the debt. And it would create the illogical situation where the release or abandonment of a lien would not affect the underlying debt, but if the lien is extinguished by a senior lien foreclosure, the debt would be lost.

B. The Trial Court's Reliance on *Washington Mutual* Was Misplaced.

The trial court granted summary judgment against Beal Bank based on a fundamental misreading of this Court's decision in *Washington Mutual*. In fact, *Washington Mutual* has no application in this case, for numerous reasons.

First, the trial court extended *Washington Mutual* beyond its own terms. As Justice Guy explained in a concurring opinion: "[W]here a junior deed of trust holder does not foreclose, that junior deed of trust

holder is not precluded from suing under the note." *Washington Mutual,* 115 Wn.2d at 60. And more significantly, the entire Court, in a later Clarifying Opinion, held: "We do not herein address the matter of a junior deed of trust holder's continued right to sue the debtor on the promissory note because it is not before us." *Washington Mutual,* 800 P.2d 1124.

Second, *Washington Mutual* is factually distinguishable in key respects. In *Washington Mutual*, the junior lienholder (Washington Mutual) had purchased the property at a non-judicial foreclosure sale. Here, Beal Bank did not purchase the property at a non-judicial foreclosure sale and did not sue for a "deficiency," but rather simply sought to enforce its rights under separate (albeit now unsecured) promissory notes. Likewise, *Washington Mutual* did not involve a co-debtor (such as respondent Cashman here) whose property was not subject to the foreclosure. Even read in its broadest terms, *Washington Mutual* provides no basis to extinguish the debt of a co-borrower who had no interest in the collateral foreclosed upon.

Third, *Washington Mutual* arose in response to a question certified by the Ninth Circuit Court of Appeals to enable the Ninth Circuit to interpret a federal regulation relating to the redemption rights of the Internal Revenue Service, which held a third priority lien, vis-à-vis a non-foreclosing second deed of trust holder who purchased at the foreclosure

sale held by the holder of a first deed of trust. The language of the federal regulation suggested that the answer to the question certified turned in part on whether the junior deed of trust holder's lien was "partially or fully satisfied" by the foreclosure sale. *Washington Mutual*, 115 Wn.2d at 56; 26 C.F.R. § 301.7425-4(b)(2)(ii) (1986). The exact question certified by the federal court was the following: "In Washington, may a nonforeclosing junior lienor ***who purchases property at a nonjudicial foreclosure*** sale sue for a deficiency under Washington law, and, if so, what is the manner of computing the deficiency?" 115 Wn.2d at 55 (emphasis added). The Supreme Court's answer was that a non-foreclosing junior deed of trust holder *who purchases at a nonjudicial foreclosure* sale may not sue for a deficiency judgment. This resulted in the IRS being required to pay Washington Mutual the full amount of its debt in order to redeem the property. Here, however, Beal Bank did not purchase at any foreclosure sale, rendering *Washington Mutual* wholly inapplicable to this case.

Fourth, jurisdictional considerations relating to questions certified from a federal court require a narrow reading of the *Washington Mutual* case. When a federal court certifies a question of state law to this Court pursuant to RCW 2.60, "the [C]ourt lacks jurisdiction to go beyond the question certified," and "[t]he federal court retains jurisdiction over all

matters except the local question certified." *Broad v. Mannesmann Anlagenbau*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000). Thus, any reliance on the *Washington Mutual* case beyond the narrow bounds of the question certified *in that case* is inappropriate.

Fifth, the question certified by the Ninth Circuit to the Court in *Washington Mutual* used the term "deficiency," and the opinion itself speaks of the availability of a "deficiency judgments" to Washington Mutual. Both in common usage as well as Washington statutes governing mortgages and deeds of trust, a "deficiency judgment" refers to the amount of a debt or obligation secured remaining unsatisfied, if any, after foreclosure of the lien securing the debt or obligation.[4] Here, because

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[4] Black's Law Dictionary defines a "deficiency judgment" as "[a] judgment against a debtor for the unpaid balance of the debt if a foreclosure sale or sale of repossessed personal property fails to yield the full amount of the debt due. – Also termed *deficiency decree.*" BLACK'S LAW DICTIONARY 859 (8th ed. 2004) (emphasis in original). Likewise, in RCW 61.12.070, which concerns judicial foreclosure of mortgages and personal property liens, the term "deficiency judgment" refers to "the balance due on the mortgage, and costs which may remain unsatisfied after the sale of mortgaged premises" which can only mean the balance due on the obligation secured by the mortgage being foreclosed. Similarly, the Deed of Trust Act provides that (except in the case of commercial loans) a "deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale under ***that*** deed of trust," again making clear that a deficiency judgment arises only with respect to the obligation secured by the deed of trust being foreclosed. *See* RCW 61.24.100(1) (emphasis added).

Beal Bank never foreclosed its junior deed of trust, and never sued for a "deficiency judgment," *Washington Mutual* has no application.

Sixth, *Washington Mutual* was decided prior to a significant amendment to the Deed of Trust Act. At that time, the Deed of Trust Act included reference to satisfaction of the obligation secured,[5] and the federal regulation giving rise to the question certified to the Court in *Washington Mutual* depended in part on whether the debt held by the junior lienholder is "partially or fully satisfied." In 1998, the anti-deficiency provisions of the Deed of Trust Act were revised by removing language to the effect that a trustee's sale satisfies the obligation secured, and substituting language barring a deficiency judgment on the obligations secured by a deed of trust against borrowers, grantors, and guarantors after a trustee's sale under that deed of trust, except to the extent specifically provided for in the case of deeds of trust securing commercial loans.[6]

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[5] Prior to 1998, the Deed of Trust Act provided that "[f]oreclosure, as in this chapter provided, shall *satisfy the obligation secured by the deed of trust foreclosed* . . ." RCW 61.24.100 (1990) (amended 1998) (emphasis provided).

[6] This change was made because in practice the "satisfaction" language raised questions as to its effect on a continuing guaranty, and the validity of liens on other property securing such debt. *See* DEED OF TRUST ACT WORKING GROUP, GORDON W. TANNER, CHAIR, EXECUTIVE SUMMARY OF 1998 PROPOSED AMENDMENTS TO THE WASHINGTON DEED OF TRUST ACT, Jan. 16, 1998, at 4, *concerning* ESSB 6191, 55th Leg., 1998 Reg. Sess. (as passed by the Senate Feb. 11, 1998) (attached as an addendum to this brief). Apparently, it was recognized that to the extent the debt was not

Because *Washington Mutual* was decided when the Act included reference to satisfaction of the secured obligation, and the federal regulation giving rise to the question certified to the Court in *Washington Mutual* depended on whether debt held by the junior lienholder is "partially or fully satisfied," *Washington Mutual* does not apply in this case.

Seventh, at the time *Washington Mutual* was decided, the Deed of Trust Act did not provide that a foreclosure of a senior deed of trust barred a deficiency judgment by the holder of a junior deed of trust whose lien was extinguished. *See* RCW 61.24.100 (1990) (amended 1998). Nor does it so provide today. Prior to 1998, the RCW 61.24.100 provided as follows:

> Foreclosure, as in this chapter provided, shall satisfy the ***obligation secured by the deed of trust foreclosed***, regardless of the sale price or fair value, and no deficiency decree or other judgment shall thereafter be obtained ***on such obligation*** . . .

RCW 61.24.100 (as in effect in 1990) (emphasis added). In *Washington Mutual*, this Court cited this former statute in support of its statement that "Washington law provides that no deficiency judgment may be obtained when a deed of trust is foreclosed." 115 Wn.2d at 58. But that is not what

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fully paid from proceeds of the trustee's sale it was not in fact satisfied and that the purpose of the anti-deficiency statutes could be achieved through a statutory bar on deficiency judgments without also saying the debt was satisfied.

the statute then said. Instead, it said that no deficiency judgment would be available on the obligation secured by the deed of trust foreclosed. Similarly, at all relevant times in this case, the Deed of Trust Act has said this about deficiency judgments:

> Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale under ***that*** deed of trust.

RCW 61.24.100(1) (emphasis added).[7] Here, Beal Bank never foreclosed its junior deed of trust. The only way that *Washington Mutual* can be reconciled with the clear language of the former and current Deed of Trust Act is if the Court in *Washington Mutual* was treating the bank as the holder of the lien being foreclosed.[8] Accordingly, the opinion in

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[7] In the case of commercial loans, if the fair value of the property sold at the trustee's sale to the beneficiary or an affiliate of the beneficiary is less than the unpaid obligation secured by the deed of trust immediately prior to the trustee's sale, deficiency judgments are permitted (i) against a borrower or grantor of the deed of trust (unless the property is occupied by the borrower as its principal residence at the date of the sale) to the extent the value of the property is diminished because of waste and for wrongful retention of rents, insurance proceeds or condemnation awards by the borrower or grantor, and (ii) against a guarantor if required notices are timely given, in each case provided the action is commenced within the time prescribed in the Act.

[8] Under the federal regulation the Ninth Circuit was attempting to interpret when it certified its question to this court, the amount to be paid to Washington Mutual Savings Bank by the IRS to redeem the property would be determined as though the bank were "the holder of the [first] lien

Washington Mutual should be understood to apply only to the narrow circumstances in which the certified question arose.

For all these reasons, *Washington Mutual* has no application to this case and cannot stand as a bar to the right of Beal Bank, or any creditor, to sue on an underlying debt even if its junior lien/deed of trust is extinguished by the foreclosure of a senior deed of trust. The trial court's decision to the contrary should be reversed.

C. The Trial Court's Ruling, if Affirmed, Will Have Profoundly Negative Effects on Current and Future Lending in This State.

If affirmed, the trial court's decision would have sweeping effects on existing loan obligations as well as the prospects for future lending and borrowing in this state. With respect to existing debt, junior lienholders need to know whether their existing loans can be wiped away by a non-judicial foreclosure by a senior lienholder of all or even a portion of its collateral. Vast amounts of existing debt are at peril if the trial court's erroneous ruling is upheld.

With respect to future lending, lenders need to know whether new loans secured by junior deeds of trust on real property can be extinguished by a non-judicial foreclosure by a senior lienholder. If that is in fact

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being foreclosed" if certain conditions were satisfied. 26 C.F.R. § 301.7425-4(b)(2)(ii) (1986).

determined to be the law, Washington lenders naturally will be reluctant to make such loans, which will have a chilling effect on the lending climate in the State of Washington. And lending, of course, is a two way street: every loan, by definition, has both a lender and a borrower. If lenders reduce or stop second mortgage lending secured by real property, borrowers will correspondingly be deprived of the ability to borrow against the equity in their real property.

Many borrowers in this state depend upon the availability of financing secured by a junior lien deed of trust or mortgage. A major example is home improvement loans and home equity lines of credit, which often are secured by second lien deeds of trust on residences. Another example is the use of second mortgages to provide credit enhancement for small businesses. Many small or start-up businesses require credit enhancement in the form of personal guaranties and deeds of trust on whatever real estate is available, often personal residences of the business owner. In addition, credit enhancement often is required for larger more established businesses in connection with working capital or inventory financing.

But if this Court holds that extinguishment of the junior deed of trust by foreclosure of a senior deed of trust will bar an action on the debt held by the junior lienholder, lenders will be reluctant to engage in such

lending. The field of home equity financing and other secondary lending will substantially dry up—to the detriment of lenders, borrowers, and the entire housing and commercial real estate industry. In addition, to the extent that such *secured* lending is replaced with *unsecured* lending, customers will generally be required to pay higher borrowing costs associated with unsecured lending, as well as lose the availability of the federal income tax deduction of interest paid on borrowing secured by their residence.

Further, because the first lien often will be large in relation to the collateral value represented by the junior deed of trust, lenders would be put in the position of having to advance large sums of money to protect a relatively small collateral value or else lose the entire underlying debt. This cannot help but have a chilling effect on the availability of credit currently supported in part by second deeds of trust.

IV. CONCLUSION

For the foregoing reasons, the Court should reverse the trial court's decision and make clear that in Washington, extinguishment of a junior deed of trust or mortgage by foreclosure of a senior deed of trust or mortgage will not satisfy the obligation secured by the junior deed of trust or mortgage, and that after such foreclosure the holder of the junior deed of trust or mortgage may bring an action on the obligation secured thereby.

DATED this 20th day of April, 2007.

Davis Wright Tremaine LLP
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DECLARATION OF SERVICE

Jennifer Sima states:

I am a resident of the State of Washington, I am over the age of 18 years, I am not a party to this action, and am competent to be a witness herein.

On this 20th day of April, 2007, I caused to be filed with the Washington State Supreme Court, the document to which this declaration is attached (the original and one copy). I also served copies of said document on the following parties as indicated below:

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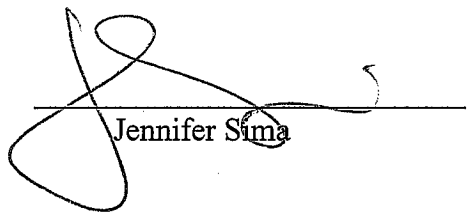

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Attached is the Executive Summary prepared by the Deed of Trust Act Working Group of the 1998 Proposed Amendments to the Washington Deed of Trust Act, referenced in Footnote 6, on page 11 of the Amicus Brief submitted to this court by the undersigned on April 20th, 2007.

DATED this 24th day of April, 2007.

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Attorneys for *Amicus Curie* Washington Bankers Association, the Washington Mortgage Lenders Association, the Washington Financial League, the Washington Credit Union League, and the Washington Independent Community Bankers Association

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DECLARATION OF SERVICE

Jennifer Sima states:

I am a resident of the State of Washington, I am over the age of 18 years, I am not a party to this action, and am competent to be a witness herein.

On this 24th day of April, 2007, I caused to be filed with the Washington State Supreme Court, the document to which this declaration is attached (the original and one copy). I also served copies of said document on the following parties as indicated below:

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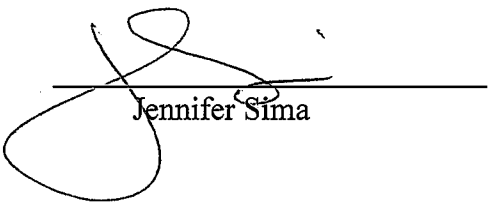

Jennifer Sima

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SB 6091

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Executive Summary of 1998 Proposed Amendments to the Washington Deed of Trust Act

Prepared by Deed of Trust Act Working Group Members
Gordon W. Tanner, Chair
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The 1998 proposed amendments to the Washington Deed of Trust are the work product of the persons whose names and affiliations are set forth on Exhibit A to this Executive Summary. That group was chaired by Gordon W. Tanner, immediate past-Chair of the Washington State Bar Association Real Property Probate and Trust Section. It was formed at the suggestion of John Gose to Gordon Tanner by gathering interested attorneys whose practices emphasize commercial, residential and consumer lending practices following the veto of Senate Bill 5554 by Governor Locke for lack of enough exposure and comment, after that Bill was passed in 1997. The foundation for these new amendments was SB 5554, but the committee went well beyond that proposal and undertook a complete review of the existing law found at RCW 61.24. Many of the proposed changes are technical in nature and are needed to clarify questions in the existing law.

This proposed bill has been studied extensively by all relevant interest groups, incorporates many suggestions from a broad spectrum of practitioners, is based on the principle that if a consensus within the working group developed the suggestions were included, without requiring unanimous support, amends 12 of the 14 sections of the existing law, and adds 4 new sections. It is sponsored by the Washington State Bar Association after review, hearings and approval for sponsorship by the WSBA Real Property Council and the full WSBA Real Property Probate and Trust Executive Committee, the WSBA Legislative Committee and the WSBA Board of Governors. It has also been circulated to interested groups, including the Washington Land Title Association, Washington Mortgage Lenders (sponsors of SB 5554), Washington Credit Union League, and Washington Bankers Association. In addition, Steve Fredrickson of Columbia Legal Services and David Leen, counsel to borrowers were present at the meetings of and deeply involved in the working group.

What follows is a brief commentary on the bill and the changes it would effect in existing law (this is not a description of the existing law, except to the extent it is changed):

Section 1 (New)

Adds a definitions section to the statute to promote consistency and clarity in use of repetitive key terms.

Section 2 (RCW 61.24.010)

Repeals an earlier amendment that allowed "domestic corporations" to act as trustees, except Washington corporations that are wholly owned by a professional entity (i.e., a corporation, partnership or limited liability company that is wholly owned by licensed attorneys) or by a chartered banking entity. Because of the earlier amendment, a number of out-of-state entities

have been incorporating in Washington with no physical presence within the state for the sole purpose of acting as trustees in nonjudicial foreclosures. Unlike the other parties authorized to act as trustees, they are essentially unregulated and may offer the grantor no in-state contact.

Also expands those entities authorized to act as trustee to include the additional professional limited liability entities that have recently been authorized under state law, provided the owners of such entities are all licensed attorneys.

Also codifies existing practice regarding the appointment of a successor trustee under a deed of trust. Because the statute provides the beneficiary with the power to appoint a new trustee at its discretion, the current language requiring the existing trustee to resign merely complicates the process and results in increased costs, particularly in instances where it is difficult to locate the original trustee. The amendment addresses this by providing that the appointment of a successor trustee by the beneficiary is deemed a resignation of the predecessor trustee.

Section 3 (RCW 61.24.020)

Reiterates current law to the effect that a deed of trust may be foreclosed judicially irrespective of whether the property is used principally for agricultural purposes. Also, adds a provision incorporating an existing concept in the Washington Uniform Commercial Code to the effect that when the deed of trust encumbers personal and real property, the trustee is entitled to sell both at the sale.

Section 4. (RCW 61.24.030)

Provides that in addition to the *statement* required by the existing statute to the effect that the encumbered property is not used for agricultural purposes, the property is not, *in fact*, so employed, and defines what is meant by "agricultural" by reference to a definition that is being incorporated nationally into the Uniform Commercial Code.

Part (6) requires the trustee to have an address in the state where personal service of process may be made prior to the date of the notice of trustee's sale in order to facilitate the ability of the borrower to notify the trustee if it intends to contest or enjoin the sale.

Subsection (7)(b) – Permits reference to the deed of trust in the notice of default to be made by county and auditor's file number, rather than by book and page. This conforms with the manner in which the deed of trust is identified in the other notice documents.

Section 5 (RCW 61.24.040)

Facilitates the foreclosure process by lengthening the two time periods during which the notice of trustee's sale must be published from five to eight days. It has no practical impact on actual notice available through publication to the grantor or other interested parties.

Part (b)(vi) requires a notice of trustee's sale to be given to the occupants of property consisting of a single family residence or an apartment complex containing up to four units. Other additions to this section require the notice to identify any personal property that may be sold at

the sale and any other action that is pending to foreclose other security. Also, a more informative section dealing with the ability to obtain a restraining order from a court and the possible effect of the foreclosure upon occupants of the property are required.

Section 6 (NEW)

Permits lender to give notices of default and trustee's sales to a guarantor of a commercial loan. The notices must be informative – i.e., recite the basic rights of the guarantor to cure the default, repay the debt and to certain defenses – and are a precondition to the ability of the lender to seek a deficiency against that guarantor.

Section 7 (RCW 61.24.050)

Clarifies when a trustee's sale will be deemed final. The Bankruptcy Reform Act of 1994 provides that a default under a lien on the debtor's principal residence may be cured "until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law. . . ." The issue of whether a trustee's sale is final when the auction is concluded, or when a trustee's deed is executed or recorded, has become central in many bankruptcy cases where a debtor seeks to cure a default pursuant to a bankruptcy plan in connection with a bankruptcy filed after the sale has been conducted, but before the deed has been executed or recorded. The amendment provides that a trustee's sale will be deemed final when the trustee accepts a bid, provided the trustee's deed is recorded within fifteen days thereafter.

Section 8 (RCW 61.24.060)

Eliminates a reference that is no longer required because of the addition of definitions to the statute and replaces it with language to the same effect to match the notice in Section 5(9).

Section 9 (RCW 61.24.070)

Clarifies the beneficiary's right to "credit bid" the amount of its debt at the trustee's sale. Although the statute is now silent as to the manner in which the beneficiary may bid at the sale, trustees uniformly accept credit bids from the beneficiary. This amendment is intended to confirm that process, as well as the trustee's right to require payment in the form of cash, certified check, cashier's check, money order or electronic transfer for any amounts bid by the beneficiary in excess of such debt or by a third party.

Section 10 (RCW 61.24.080)

Creates specific procedures for dealing with surplus sales proceeds. The statute currently provides little guidance to the trustee or the courts regarding the disposition of such proceeds, and this amendment requires notice to be given to an interested party seeking to receive such proceeds and to require them to make an appropriate motion to the court before payment.

Section 11 (RCW 61.24.090)

Requires all reinstatement payments permitted by the statute to be made in the form of cash, certified check, cashier's check, or money order and will avoid delays resulting from disputes over the sufficiency of non-cash payments.

Section 12 (RCW 61.24.100)

Addresses the extent to which borrowers and guarantors are liable after a trustee's sale if the bid price at the sale does not satisfy the entire balance of the debt (the difference between the sale price and debt is commonly referred to as a "deficiency"). Currently, the statute simply provides that a trustee's sale "satisfies" the obligations the deed of trust secures, although in a commercial loan, the lender is permitted to proceed against other collateral if there is a deficiency. In many jurisdictions, the liability of a guarantor in the face of this type of "anti-deficiency" statute has been clarified by the courts or subsequently enacted legislation. Such is not the case in Washington. Indeed, in those instances in which the courts have had an opportunity to provide meaningful guidance in this area they have chosen not to do so. See, e.g., Kaiser Aluminum v. McDowell, 58 Wn. App. 283 (1990); Thompson v. Smith, 58 Wn. App. 367 (1990).

The following principal concepts are contained in this section:

1. Except for commercial loans (a "commercial loan" being defined as one that is not made primarily for personal, family or household purposes), neither a borrower nor a guarantor is liable for a deficiency after a trustee's sale.

2. A reiteration of the current status of the law to the effect that by securing a loan with a deed of trust, the lender does not lose its right to obtain a judgment against the borrower or guarantor before or instead of a foreclosure.

3. A reiteration of the current status of the law to the effect that if the lender sues on the debt and that action is completed, and if some portion of the debt remains outstanding, it is not precluded from foreclosing a deed of trust.

4. A trustee's sale under a deed of trust securing a commercial loan does not preclude a lender from suing the borrower for a decrease in the fair value of the property caused by waste committed by the borrower or for damages caused by the wrongful retention by the borrower of any rents, insurance proceeds or condemnation awards if, and only to the extent, the fair value of the property sold at the trustee's sale is less than the debt. "Waste" is a legal term that means an abusive or destructive use of property. However, even this limited right of recovery is prohibited if the property secured by the deed of trust is occupied by the borrower as its principal residence as of the date of the trustee's sale.

5. A reiteration of current law to the effect that a trustee's sale under a deed of trust securing a commercial loan does not preclude the lender from foreclosing other collateral granted for that debt to the extent of a deficiency.

6. A guarantor of a commercial loan is liable for a deficiency. However:

   a. The lender must commence its action against the guarantor within one year, except as extended in bankruptcy or other debtor protection statutes (as opposed to the normal six-year statute of limitations);

   b. The guarantor must have been given a notice of the trustee's sale and an opportunity to cure the default;

   c. The guarantor is permitted to establish the fair value of the property (i.e., the fair market value of the property on the date of the trustee's sale, less prior liens not extinguished by the sale). The amount of the deficiency judgment cannot exceed the difference between (i) the bid price and the remaining debt or (ii) the fair value of the property and the remaining debt, whichever is less;

   d. If a guarantor of a commercial loan secures that guaranty with a deed of trust against that person's own residence, in the foreclosure of that residence the guarantor is credited with an amount equal to the homestead; and

   e. The guarantor will not be liable if the borrower agrees to give the lender a "deed in lieu of foreclosure" unless the guarantor otherwise agrees as a part of that settlement.

7. A reiteration of current law that a deed of trust may be foreclosed judicially as a mortgage.

8. A clarification that the parties are free to agree to further limit, but not expand, a lender's rights to a deficiency from a borrower or guarantor.

9. A preservation of any current rights of a guarantor to obtain a reimbursement from the borrower of the amount the guarantor is required to pay the lender while permitting the borrower and guarantor to agree to modify that right.

10. A provision that these changes to the statute apply only to deeds of trust executed after its effective date and do not affect existing loans.

Note that in other sections, the revisions to the statute make it clear that a guarantor cannot also be a borrower (or a general partner in a general partnership borrower), since this would enable a lender to easily avoid the anti-deficiency protection given to borrowers (Section 1). A guaranty can only arise by written agreement (Section 1). The notice of trustee's sale that must be given to the guarantor in order for the guarantor to be liable for a deficiency must inform the guarantor of that potential liability; that it has the right to reinstate the debt, cure the default or repay the debt; that it will have no right to redeem the property after the trustee's sale; that the action to enforce the guaranty must be brought within one year after the trustee's sale; and that

the guarantor will have the right to establish the fair value of the property to limit its liability should it be sued (Section 6).

Section 13 (RCW 61.24.110)

The current statute allows the deed of trust to be reconveyed only by the trustee following a request from the beneficiary. The process can be cumbersome and time-consuming, particularly where the named trustee may not be readily located. In order to further simplify the process, to take full advantage of the efficiencies that will arise with the increased use of digital signatures, and to avoid unnecessary cost and expense to all involved, this amendment would allow certain regulated beneficiaries to obtain the release of their deeds of trust upon payment in full of the underlying obligations without involving the trustee.

Section 14 (RCW 61.24.130)

Certain bankruptcy court rulings indicate that a continuance of trustee's sale itself may violate the automatic stay. Such decisions make it practically impossible to continue the sale in the manner now required to take advantage of the abbreviated post stay procedures of RCW 61.24.130(4). This amendment will permit the sale to be held on the date to which it was originally continued if the stay is removed by that time.

Section 15 (NEW)

A primary goal of this chapter is to assure open and competitive bidding at a trustee's sale. Trustees have witnessed an increased number of instances of efforts by potential third party bidders to interfere with a free and open bidding process. The new section is intended to make any such act a violation of the Washington Consumer Protection Act.

Section 16 (NEW)

Affords protection to tenants occupying a single-family residence or an apartment complex of up to four units by requiring a court order or borrower's consent before a lender may enforce an assignment of rents against that tenant. Also provides such a tenant with a defense for alleged wrongful payment if that order or consent is complied with. This section is designed to alleviate concerns of residential tenants who may receive conflicting requests for rent payments when a borrower is in default under a loan.

Section 17 (RCW 7.28.300)

A technical amendment to ensure that a deed of trust can be removed from record title if the debt that it secures is barred by the statute of limitations.

Section 18 (RCW 7.60.020)

A technical amendment that clarifies that a receiver may be appointed under an assignment of rents when the lender holds a deed of trust as opposed to a mortgage.

EXHIBIT A
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January 16, 1998

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